BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEPHEN E. MCCOLLUM	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,021,688
SONIC DRIVE-IN	)	
Respondent	)	
AND	)	
	)	
HARTFORD	)	
Insurance Carrier	)	

ORDER

Claimant appealed the May 12, 2005, preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

Claimant requests workers compensation benefits for injuries he received on January 16, 2005, after being struck by one of respondent's assistant managers. In the May 12, 2005, Order, Judge Klein denied claimant's request for benefits after finding that claimant's injuries resulted from a personal dispute and did not arise out of or in the course of employment.

Claimant contends Judge Klein erred. Distilled to its essence, claimant argues the altercation was work-related as he was on respondent's premises at the time of the altercation only because he had been summoned by the assistant manager. Therefore, claimant requests the Board to reverse the May 12, 2005, Order.

Conversely, respondent and its insurance carrier contend the preliminary hearing Order should be affirmed. They argue the altercation between claimant and the assistant manager was over a personal matter. Respondent and its insurance carrier contend claimant's injuries neither arose out of nor in the course of claimant's employment with respondent.

The only issue before the Board on this appeal is whether claimant sustained personal injury by accident arising out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes the May 12, 2005, Order should be affirmed.

Respondent employed claimant on a part-time basis as a cook. On January 16, 2005, claimant was not scheduled to work. Claimant, who was sitting in a diner across the street from respondent's store, was asked by text message if he wanted to work in place of a co-worker who had not reported to work at the scheduled time. Other text messages were sent back and forth between claimant and the co-worker who had inquired if claimant wanted to come into work. And one of those messages referred to the newborn baby of Mike Smith, Jr., one of respondent's assistant managers, as a "butt chin."

Claimant lived next door to respondent's store. When claimant left the diner to return to his apartment, Mr. Smith saw claimant and summoned him. Claimant approached Mr. Smith and one or more punches were thrown. In short, claimant sustained injuries to his jaw, which required surgery, and the right side of his body, which was bruised from falling to the pavement.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[1] "Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case."[2]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the

[1] K.S.A. 44-501(a).

[2] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[3]

Fights between co-workers usually do not arise out of employment and generally will not be compensable.[4] If an employee is injured in a dispute with another employee over the conditions and incidents of the employment, then the injuries are compensable.[5] For an assault stemming from a purely personal matter to be compensable, the injured worker must prove either the injuries sustained were exacerbated by an employment hazard,[6] or the employer had reason to anticipate that injury would result if the co-workers continued to work together.[7]

The altercation between claimant and Mr. Smith stemmed from claimant's reference to Mr. Smith's newborn baby. Accordingly, the incident was not related to claimant's work. And the mere fact that Mr. Smith summoned claimant and was one of claimant's supervisors does not make the claim compensable.

The Board affirms the Judge's conclusion that claimant has failed to prove the January 16, 2005, incident and his resulting injuries arose out of and in the course of his employment with the respondent. The preliminary hearing Order should be affirmed.

For future reference, claimant's counsel is encouraged to introduce only those medical records that are material to the issues.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[8]

WHEREFORE, the Board affirms the May 12, 2005, Order entered by Judge Klein.

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[3] *Id.* at 278.

[4] See *Addington v. Hall*, 160 Kan. 268, 160 P.2d 649 (1945).

[5] See *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 506-507, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[6] *Baggett v. B & G Construction*, 21 Kan. App. 2d 347, 900 P.2d 857 (1995).

[7] *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

[8] K.S.A. 44-534a(a)(2).

IT IS SO ORDERED.

Dated this ____ day of June, 2005.

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director